

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-409

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE,  
ET AL., *Petitioners,*

v.

DR. JOSEPH T. SKEHAN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

**BRIEF FOR RESPONDENT IN OPPOSITION**

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**STATEMENT**

Plaintiff-respondent, Dr. Joseph Skehan, was a professor at Bloomsburg State College. In May 1970, he was informed that 1970-71 would be his terminal year of teaching (i.e., that his teaching contract would not be renewed after the 1970-71 academic year). In October 1970, however, he was discharged, in mid-term of his 1970-71 contract.

Dr. Skehan thereafter brought suit against Bloomsburg State College, the members of its Board of Trustees, and its President. He alleged that both the May 1970 terminal year decision and the October 1970 discharge decision were made in violation of his First and Fourteenth Amendment rights and in violation of the College's own regulations.

The District Court held that plaintiff was denied Fourteenth Amendment procedural due process with respect to the October 1970 mid-term discharge. The District Court made no findings, however, upon Dr. Skehan's additional claims (1) that the May 1970 terminal year decision was based upon his First Amendment activities, and (2) that the terminal year decision was made in violation of the College's own procedural and academic freedom regulations. The District Court awarded only nominal damages (\$1.00) and denied attorney's fees, and made no findings on the issue of official immunity of the individual defendants.

The Court of Appeals affirmed the District Court's holding that plaintiff was denied procedural due process with respect to the October 1970 discharge, and remanded to the District Court for consideration of plaintiff's claims concerning the May 1970 terminal year decision. In addition, despite the absence of any District Court findings with respect to official immunity, the Third Circuit held that the individual defendants were engaged in discretionary functions and therefore were immune from individual monetary liability. Finally, the Court of Appeals held that attorney's fees should be awarded to plaintiff based upon the "private attorney general" rationale.

This Court granted plaintiff's petition for a writ of certiorari, vacated the Court of Appeal's judgment,

and remanded the case for further consideration in light of *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), and *Wood v. Strickland*, 420 U.S. 308 (1975).

On remand from this Court, the Third Circuit (*en banc*) again remanded to the District Court for findings on plaintiff's claims concerning the May 1970 terminal year decision, and for consideration of the issues of official immunity and the possible award of attorney's fees against the College and the individual defendants, based upon "bad faith".

### ARGUMENT

Petitioners seek review by this Court of three issues: (1) whether the Eleventh Amendment precludes an award of attorney's fees as costs against a State agency which pursues a bad faith, vexatious, wanton or oppressive course of litigation; (2) whether attorney's fees may be awarded against officials in their individual capacities for pre-litigation bad faith; and (3) whether the Court of Appeals should have ruled in defendant's favor on the issue of official immunity, rather than remand to the District Court for findings in the first instance.

As we show below, *none of the issues presented by Petitioners is ripe for determination by this Court* (even if any of them would otherwise merit review). No attorney's fees yet have been awarded against any of the defendants, nor have any of the individual defendants been held monetarily liable. Furthermore, with respect to the issue of attorney's fees against the individual defendants, recently enacted federal legislation renders this issue academic in this case.



1. In remanding to the District Court, the Court of Appeals held that "attorney's fees may be awarded as costs against a sovereign otherwise immune, if it pursues a bad faith, vexatious, wanton or oppressive course of litigation. . . ." (11a-12a).<sup>1</sup> The Third Circuit stated that "since such an award is considered to be an award of costs, it would be governed by the established rule that state sovereign immunity is no bar to an award of costs." (11a).

Petitioners contend that the Eleventh Amendment is a bar to any such award, and urge this Court to review the Third Circuit's contrary holding. Review by this Court, however, clearly is premature.

The Third Circuit did *not* order the award of attorney's fees against Bloomsburg State College. Far from it. The Court in fact held that defendants, including the College, had *not* acted in bad faith thus far in maintaining their defense of this litigation (8a). All the Third Circuit did, in light of its remand to the District Court for trial of plaintiff's remaining substantive claims, was state that "since we are remanding and we cannot predict the *future* course of this litigation, we cannot foreclose consideration of the award of attorney's fees as costs based upon any lack of good faith in maintaining the litigation *in the future*." (8a(emphasis added); see also 11a-12a).

Thus, the Court of Appeals' holding, and Petitioners' objections to it, will affect the parties only if the College pursues bad faith, vexatious, wanton or oppressive conduct in the future course of litigation,

<sup>1</sup> Page numbers followed by "a" refer to the Appendix contained in the petition for a writ of certiorari.

and if the District Court then exercises discretion to award attorney's fees to plaintiff for such conduct. Even assuming that the issue, in the abstract, were one which would warrant this Court's review, the issue plainly is not ripe for review at this time.

2. In its remand, the Court of Appeals held that attorney's fees may be awarded against "the individual defendants for bad faith, vexatious, wanton or oppressive conduct . . . prior to . . . this litigation. . . ." (22a). Petitioners contend that, in so doing the Third Circuit is permitting the possible award of attorney's fees on a basis not recognized and permitted by this Court in *Alyeska, supra*.<sup>2</sup>

For the purposes of this case, this issue is academic. This action was brought against the individual defendants pursuant to 42 U.S.C. § 1983 (51a). On October 19, 1976, the President signed The Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559. That

<sup>2</sup> In *Alyeska, supra*, this Court held that attorney's fees may be awarded, *inter alia*, where "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' *F. D. Rich Co.*, 417 U.S., at 129 (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962));" 421 U.S., at 258-259. Petitioners contend this applies only where the defendant acts in bad faith during the course of litigation, and does not apply to pre-litigation bad faith. *Alyeska* does not so hold, however. It does not limit the bad faith rationale to either pre- or post-litigation conduct. Indeed, the Court in *Alyeska* specifically cites *Vaughan v. Atkinson* in support of the bad faith rationale. *Alyeska, supra*, at 258-259. *Vaughan*, specifically relied upon below by the Court of Appeals (8a-10a), upheld the award of attorney's fees for pre-litigation bad faith. Hence, it would appear that this issue previously has been resolved by this Court, adversely to the position urged by Petitioners. Thus, grant of a writ to review this issue would not at all be warranted, even if the issue were ripe on the state of the record herein.

Act specifically provides, *inter alia*, that the court, in its discretion, may award reasonable attorney's fees to the prevailing party in Section 1983 suits.<sup>3</sup> The Act applies to suits presently pending in the federal courts. See, 122 Cong. Rec. S. 17,052 (daily ed. Sept. 29, 1976); 122 Cong. Rec. H. 12,166 (daily ed. Oct. 1, 1976). Thus, in this case, the District Court now possesses *statutory* authorization to award attorney's fees against the individual defendants.

In any event, review would be premature. No attorney's fees yet have been awarded against any of the individual defendants. As stated by the Court of Appeals, "the obduracy ground was not previously considered. We therefore remand this aspect of the case to the district court for additional findings on the obduracy issues." (13a). "Whether the facts of this case warrant its application against any of the defendants is a matter on which the district court should pass in the first instance." (10a). Thus, whether attorney's fees would be awarded at all based on pre-litigation bad faith is pure speculation at this stage. The issue presented clearly is not ripe for review by this Court.

3. The Third Circuit has remanded the issue of official immunity to the District Court. In so doing, the Court of Appeals concluded that "*Wood v. Strickland* significantly modified the law of immunity upon which we relied in affirming the district court, and that a remand for additional findings of fact is now required" (13a). The Court added:

"There was no finding with respect to the defendants' knowledge or the reasonableness of their belief in the legal necessity for a pre-termination hearing. Moreover, in our prior review, since we assumed that we were dealing with an unqualified privilege, we had no occasion to pass upon the

<sup>3</sup> The text of the Act is set forth in an Appendix to this brief.

strength of the evidence supporting the district court's finding of good faith. Finally, since the Supreme Court has announced what we consider to be a departure from the settled prior law on governmental immunity in this circuit, we deem it appropriate that the district court be given an opportunity to reconsider both qualifications to the defendants' immunity." (17a).

None of the individual defendants have been held monetarily liable. Several of plaintiff's substantive claims have not even been tried yet. The District Court has not considered or made any findings with respect to the official immunity defense, either as to the procedural due process violation, or, of course, as to the untried claims. "[T]he scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or a trial record." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

Unless and until any of the individual defendants are held monetarily liable, the official immunity issue is not ripe for review. \*

#### CONCLUSION

For the foregoing reasons it respectfully is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# **APPENDIX**

**APPENDIX**

The Civil Rights Attorney's Fees Awards Act of 1976, P. L. 94-559, enacted on October 19, 1976, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as "The Civil Rights Attorney's Fees Awards Act of 1976".

Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." \*

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\* Section 1979 of the Revised Statutes presently is codified as 42 U.S.C. § 1983.